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Lenn J. Oare

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A STUDY OF BAR EXAMINATIONS IN INDIANA

INDIANA is the latest state to provide a bar examination as a prerequisite for admission to the bar. This requirement has long been delayed by reason of a constitutional provision to the effect that every person of good moral character, being a voter, can practice before any of the courts of the state.¹ This constitutional provision still maintains although the proposal to amend or abolish it has been five times submitted to the voters of the state, the latest attempt having been unsuccessful at the last general election (November, 1932).

Notwithstanding the constitutional provision, the Legislature of 1931 enacted a statute giving the Supreme Court of the state exclusive jurisdiction to admit attorneys to practice law in all the courts of this state.² Before the passage of this Act admission to the bar was a matter governed by the rules of each local *nisi prius* court, provided, however, such rules did not infringe upon the constitutional provision. The rules of some local courts, however, did not respect wholeheartedly the spirit of the constitutional provision and provided for an examination before a committee

¹ Ind. Const., Art. 7, § 2.

² Acts, Indiana General Assembly, 1931, ch. 64. See, also, Genesis of Bar Examinations in Indiana, 7 Notre Dame Law. 70.

on admissions appointed by the court, or, permitted an examination of the applicant in open court by members of the bar, or, permitted a trial of the issue of good moral character before a jury if demanded by a member of the bar or a bar committee. Each of these and other provisions simply harassed the applicant and tended to deter those with no knowledge of law whatsoever in seeking to exercise their constitutional prerogative to practice law. An amusing instance was that of a trial by jury on the issue of good moral character, where the member of the bar or the bar committee opposing the application would argue to the jury that the applicant was not of good moral character because he sought to practice law without sufficient knowledge,—an argument with no little logic and yet a very sinuous route to the *desideratum*.

Admission to the Supreme Court was not always sought by attorneys admitted to the lower courts and when made, was made on motion and a showing that the applicant was admitted to one of the lower courts. As a matter of fact some of the most eminent lawyers and some of the judges of the various courts, including the Supreme Court itself, were never admitted to the Supreme Court, so uselessly formal was the process. Since the enactment of the statute of 1931, many of these have apologetically applied, and have been admitted.

After the passage of the statute of 1931, the Supreme Court appointed a Board of Bar Examiners, consisting of five members, one from each Supreme Court Judicial District, and provided that this Board should hold three examinations each year, in October, March and July. The first examination was held in October, 1931, and hence there has now been held four examinations in all.

It is now apparent that the bar examinations in Indiana are unique when compared with those of any other state. Owing to the constitutional provision mentioned, any citizen,

being a voter, who satisfies the committee on character and fitness that he is of good moral character may take the examination upon paying the required fee. Not only is there no requirement as to pre-legal education but there is not, and cannot be, under the constitution, any requirement either as to pre-legal education or legal education. An ignoramus wholly devoid of legal education may take the examination. The catch comes in his being able to pass it.

By permitting any person of good moral character to take the examination, it is believed that the constitutional provision is fully respected. All applicants, regardless of their educational records, are treated alike; all have equal opportunities and are submitted to the same test. It must be deemed that although all citizens of Indiana have a political right to practice law, yet it is not an unqualified natural right, and that the court may make such reasonable rules and regulations for admission to the bar as to protect the public and advance the public welfare, so long as such rules and regulations are not discriminatory. And again the attorneys are officers of the court and the court has control over its own roll of attorneys.

The courts had such rule-making power and such control over its roll of attorneys before the enactment of the statute of 1931. The power was largely reserved and was never fully exercised until the enactment of the statute. The statute had the effect of divesting the *nisi prius* courts of their rule-making power as to admissions to the bar and placed all such power in the Supreme Court. The constitutional question is an interesting one but is not within the purview of this discussion.

During the time the Board of Bar Examiners have thus far served, they have worked out such a system, based upon a study and adaptation of other systems and developed by its own experience, as it believes to be fair and as accurate as humanely possible.

At each examination fifty written questions are propounded to be answered in writing in two days. These questions almost always call for the essay type of answer. Thus the answer is graded not on the categorical answer or "guess" of the applicant but upon the power of analysis and the knowledge of the subject as disclosed by his answer. This is eminently fair as it is a better test than the definition type of question which could be so easily answered parrot-like by a good memorizer, although he may have no capacity to apply the legal principles to fact situations. An applicant may give an entirely wrong answer categorically and yet display some knowledge of the legal principle involved, and show some ability in the application of this legal principle to the fact situation, and thus secure a high grade on his answer. In fact a correct "yes—no" answer with poor reasoning or explanation, showing no depth or soundness of knowledge, requires a lower mark than an erroneous "yes—no" answer with an intelligent comprehension of the legal principles involved and some ability to apply those principles.

It might be charged by those that are not cognizant of the system used by the Board that some of its questions are "tricky" or that the questions are involved in that they are not subject to an unquestionable answer. This conclusion may arise by reason of the fact that some, if not most of the questions, are taken from actual cases, some of which have been decided by divided courts. Such conclusion, however, is entirely erroneous. If a question decided by a divided court, or a question variously decided by the different jurisdictions, is propounded, the Board does not require, for a passing grade, the answer given by the majority opinion, nor necessarily by the prevailing rule, but requires an answer that shows a comprehensive analysis of the facts, a knowledge of the legal principle applicable, and the ability to apply this principle to the facts. In propounding such questions the Board, of course, recognizes the fact that such ques-

tions are open to fair argument on both sides,—in fact they are often asked for that very reason.

One-fifth of the questions are prepared by each member of the Board. The questions as prepared by one member are examined and criticized by the remaining members, and, after such examination and criticism, are oftentimes reframed so that in effect each question is the question of every member of the Board. The questions are graded by the members of the Board without regard to the authorship of the questions so that, with conferences had by the Board at the time of the grading, the grading represents the joint work of the entire Board. It is believed that this method assures the greatest possible uniformity in grading.

Each applicant, at the time of the examination, is assigned by the Secretary a number which is used to identify all of his manuscripts. The name of the applicant is therefore not known to the Board until after the manuscripts are all graded and the averages struck. This eliminates any possible favoritism. Each applicant stands alone and must trust in God—and in his own modicum of learning—and keep his powder dry.

The Board gives a grade of five points on each correct answer, thus making possible two hundred fifty points on the fifty questions. The passing grade is one hundred fifty points, or sixty per cent. It is recognized that a written examination is not always a fair test of intellectual attainments and that admission to the bar should not be merely a matter of arithmetic based upon marks. For this reason, in all cases where the applicant's grades are so near the passing mark as to indicate that possibly the written examination as to him is not a fair test, the written examination is supplemented by an oral examination. The experience has been that an oral examination, however, is seldom required as most of the applicants either pass the written examination or fall so far below the required mark as to render an oral examination unnecessary.

At the four examinations held there have been one hundred ninety applicants. Thirty-eight have had one re-examination; two have had the second re-examination. The total number finally passing was ninety-three and the total number of failures ninety-seven. Of those passing, six passed on their first re-examination but none on their second re-examination. Thus the number eventually passing was approximately forty-nine per cent of the total applicants. If this percentage seems low, it must be borne in mind that it is in line with that of other states, many of which require not only a legal education but also evidence of prescribed pre-legal education as a prerequisite to the taking of the examination. It might be expected that the percentage of those passing in Indiana would be somewhat lower than in other states, owing to the fact that there are no qualifications other than good moral character, and the requisite fee, before taking of the examination.

Further analysis might be interesting. Of the ninety-three who passed, fifty-three had degrees from law schools classified as class A schools by the American Bar Association; five had two years in such a school; thirty of those passed had received degrees from or had attended law schools not classified as class A schools by the American Bar Association; one who passed had no law school training.

Of the ninety-seven who failed, five had degrees from class A schools and three had two years work in such a school; eighty-seven either had a degree or had attended law schools, not classified as class A schools; two had no law school training.

Two applicants who are graduates of class A schools have failed on two examinations. All the other failures on re-examination have attended non-approved schools.

As to pre-legal work of the ninety-seven who failed, forty-five had no college work whatever, and eleven had but one year; four had no high school work.

The advantages of attendance at a class A school is here evident as only five of the ninety-seven failures were graduates of a class A school and more than two times as many of those who passed had class A training than those who did not have that training.

The question might arise, why would any applicant from a class A school fail? This question is particularly interesting in view of the contention of Dean Green in substance to the effect that the bar examination has proved a failure as a test of intelligence, capacity and fitness and should therefore be largely, if not entirely, abandoned; that these problems should be left to the determination of the law school, and that the bar examiner should have but two main duties, first, that of judging each law school to determine whether its decision should be accepted, and, second, the investigation of the personal history and educational record of each applicant.³

It is apparent to anyone, as before stated, that a written examination is not always a fair test and is by no means perfect. However, a system of admissions to the bar is a practical matter. It is not possible for the bar examiners to grade law schools and refuse all applicants who do not come from schools, which they recognize; particularly is this true in Indiana, where the Constitution prohibits any educational qualifications being required.

In all probability the failure of a few of the applicants from class A schools does not indicate the inefficiency of the examination as a test of qualification for admission to the bar. The reason probably lies elsewhere. From an examination of a list of questions prepared by the Indiana Board, it is evident that the Board believes that a person applying for admission to practice in Indiana should know something about the substantive and adjective law of Indiana, as dis-

³ See *The Bar Examiner*, June, 1932.

tinguished from the broad principles of the common law. It might be said that an applicant knowing nothing of Indiana law and qualified in the broad general field can soon learn the Indiana law after entering the practice. If so, it can be answered he can learn something about it before the examination. It may be, therefore, that the few graduates from class A schools who failed to pass the Indiana bar examination are intellectually qualified to practice law but have failed prior to the examination to review the elementary principles in their hornbooks and have failed to make even a slight study of the law of the state in which they demand the right to practice. It may be added, however, that the fifty questions propounded at each examination encompass practically the entire field of the law and that therefore there can be very few questions based upon local practice or for that matter upon the substantive law of Indiana where such law differs from the common law as taught in law schools. The Indiana Board must, under the constitution of the state and the statute which creates the board, treat all applicants on a parity regardless of the schools from whence they come or whether they come from any schools whatsoever. If a genius without law school training can pass the examination and a graduate from a recognized law school flunks—so be it! Isn't it fair play after all?

Lenn J. Oare.

South Bend, Indiana.